Petition

81-1206

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

_____

OCTOBER TERM, 1981

JAMES LEROY CHILDERS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT, THIRD JUDICIAL DISTRICT
STATE OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

The questions presented under Item I arise from the following facts: James LeRoy Childers (defendant-petitioner) was arrested and indicted for the murders of his mother, brother, and step-father. Upon his showing of indigency, the Public Defender was appointed. The Public Defender requested the appointment of a psychiatrist to examine the defendant. Later, after entry of retained counsel for defendant, defendant gave notice of intent to raise a defense of insanity pursuant to Illinois Supreme Court Rule. The court-appointed psychiatrist was not listed as a witness, though two other psychiatrists were. Over objection of defendant, the court-appointed psychiatrist and a psychologist in his employ were ordered to make reports of their examinations and findings, which tended to negate the defense of insanity. Over the further objections of defendant, the two experts testified in rebuttal for the prosecution against the defense theory of insanity. Defendant was found guilty of all three murders.

I. a. Did the described procedure violate defendant's constitutional protection against self-incrimination.

b. Did the described procedure violate defendant's constitutional right to counsel?

c. Did the described procedure violate defendant's constitutional right to equal protection?

II.Did the trial court's refusal to require a newspaper reporter to disclose his confidential source of information, when such information tended to support defendant's pre-trial motion to suppress his confession, deny defendant his constitutional right to call witnesses in his own behalf?

III.When the defendant voluntarily appeared at the Police Station after the police had begun an investigation into the murders of his mother, brother, and step-father, and remained there nearly 12 hours before he confessed, but had (a) requested permission to leave on several occasions, (b) complained of not feeling well, though receiving no medical attention, (c) requested an attorney, then continued to answer questions, and (d) claimed that he was told by police officers that, if he told them everything about the murders, he might be convicted of a lesser charge of voluntary manslaughter, was his confession improperly admitted into evidence over his motion to suppress?

PARTIES

The parties to this proceeding are as identified in the caption.

TABLE OF AUTHORITIES

I. a.

Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964).

Estelle v. Smith, _____ U.S. _____, 68 L. Ed. 2d 359, 101 S. Ct. 1866 (1981).

People ex rel. Bowman v. Woodward, 63 Ill. 2d 382, 349 N.E. 2d 57 (1976).

Jones v. Superior Court, 58 Cal. 2d 56, 372 P. 2d 919, 22 Cal. Rptr. 879 (1962).

State v. Kociolek, 23 N.J. 400, 129 A. 2d 417 (1957).

State v. Moore, 45 Or. App. 837, 609 P. 2d 866 (1980).

McGuire v. Superior Court, 274 Cal. App. 2d 155, 79 Cal. Rptr. 155 (1969).

I. b.

U.S. v. Alvarez, 519 F. 2d 1036 (CA 3, 1975).

People v. Edney, 39 N.Y. 2d 620, 350 N.E. 2d 400 (1976); *U.S. Edney v. Smith*, 425 F. Supp. 1038 (ED, N.Y. 1976); Affmd. without opinion *sub. nom.* *Edney v. Smith*, 556 F. 2d 556 (CA 2, 1977).

State v. Kociolek, 23 N.J. 400, 129 A. 2d 417 (1957).

State v. Toste, 178 Conn. 626, 424 A. 2d 293 (1979).

People v. Lines, 119 Cal. Rptr. 225, 531 P. 2d 793 (1975).

State v. Pratt, 284 My. App. 516, 398 A. 2d 421 (1978).

People V. Knippenberg, 66 Ill. 2d 276, 362 N.E. 2d 681 (1977).

People v. Ryan, 30 Ill. 2d 456, 197 N.E. 2d 15 (1964).

Cleary & Graham, *Handbook of Illinois Evidence*, §505.2.

I. c.

Estelle v. Williams, 425 U.S. 501, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976).

State v. Toste, 178 Conn. 626, 424 A. 2d 293 (1979).

II.

Dunaway v. N.Y., 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979).

Brown v. Ill., 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975).

III.

Branzberg v. Hayes, 408 U.S. 655, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972).

Matter of Farber, 78 N.J. 259, 394 A. 2d 330 (1978); cert. den. *sub. nom.* *New York Times v. New Jersey*, 439 U.S. 997, 99 S. Ct. 598, 58 L. Ed. 2d 670 (1978).

Washington v. Texas, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967).

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- B. Constitutional Provisions and Statutes . . . . . .

OPINIONS

This petition requests this Court to review the judgment of the Appellate Court of Illinois, Third District, in its opinion of March 19, 1981, reported at 94 Ill. App. 3d 104, 418 NE 2d 959, 49 Ill. Dec. 939.

JURISDICTION

The Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal on October 19, 1981. The same Court earlier, on May 19, 1981, denied Petitioner's Application for Certificate of Importance. Both the Petition and the Application were from the judgment of the Appellate Court for the Third District of Illinois on March 19, 1981, and the denial of rehearing on April 22, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), this petition being timely filed within 60 days of denial of the Petition for Leave to Appeal to the Illinois Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. C., Const., Amend. IV.
U. S. C., Const., Amend. V.
U. S. C., Const., Amend. VI,
U. S. C., Const., Amend. XIV.
Ill. Rev. Stats., ch. 38, §113-3(d).
Ill. Rev. Stats., ch. 38, §115-6.
Ill. Rev. Stats., ch. 110A, §413(c), (d).
Ill. Rev. Stats., ch. 51, §5.2 (repealed January 9, 1979).

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STATEMENT OF THE CASE

Petitioner (defendant below) James LeRoy Childers, was 17 at the time he was indicted for the murder of his mother, his younger brother, and his step-father. (V. I, pp. 3-15, 75-80). He pled not guilty, and raised an insanity defense. He was convicted and sentenced to imprisonment for his natural life by the Circuit Court of Tazewell County, Illinois.

I. A Public Defender was appointed to represent Petitioner during his initial appearances in court. That lawyer sought appointment of a psychiatrist, to be paid by the County, under applicable Illinois statute providing for appointment of experts for indigents. After Petitioner's plea of not guilty to an indictment charging him with the three murders, he was transported by the Sheriff under court order to the office of Dr. Phillip Bornstein, the psychiatrist appointed, and examined by Dr. Bornstein and Kenneth Imhoff, a psychologist in his employ.

After these proceedings, privately retained counsel entered the case for Petitioner, and the Public Defender withdrew. Both the prosecutor and Petitioner filed motions for discovery under Illinois Supreme Court Rules. Pursuant to those rules, petitioner gave pre-trial notice of his intention to assert an insanity defense,

and named the witnesses whom he would call in support of that defense. The witnesses included two psychiatrists, but did not include Dr. Bornstein or Mr. Imhoff. The prosecutor then filed a motion to compel defendant (Petitioner herein) to comply with the discovery rules by furnishing the report of Dr. Bornstein. Petitioner responded with an afirmative assertion that he did not intend to call Dr. Bornstein, and objected to the prosecution's discovery demand on the following grounds: 1) The requested information was outside the scope of the applicable discovery rule, Illinois Supreme Court Rule 413(c) and (d) *(Ill. Rev. Stats.*, ch. 110A, ¶413(c), (d)); 2) The requested information violated Petitioner's constitutional protection against self-incrimination; and 3) The requested information violated Petitioner's psychiatrist-patient privilege. The Petitioner and the prosecution both filed written motions and memoranda in support of their positions. After a hearing and argument, the trial court ordered that Dr. Bornstein's report be made available to the Prosecutor, and that if no report existed, one would be prepared and submitted to both parties.

If a written report was ever prepared pursuant to this order, it is not in the record. However, Dr. Bornstein and his psychologist, Kenneth Imhoff, testified in behalf of the prosecution, over Petitioner's objection, in rebuttal against his defense of insanity. One other psychiatrist was called in support of the prosecution's (Respondent herein) case in rebuttal. The witnesses against whom Petitioner lodged his objections at trial constituted two thirds of Respondent's witnesses on the only disputed issue in the case, sanity, and a slightly greater portion of the total time of Respondent's rebuttal testimony. Two psychiatrists were called by Petitioner during his case in chief in support of his theory and defense of insanity. Besides Dr. Bornstein and Mr. Imhoff, the Respondent called one other psychiatrist, who had examined Petitioner under court order as an agent of the State.

Petitioner sought appointment of Dr. Bornstein orally, through counsel, on July 11, 1978, as a result of which the State on July 12, 1978, obtained the appointment of another psychiatrist. The relevant orders appear at V. I, pp. 44-7. The prosecution motion for pre-trial discovery was filed on July 13, 1978 (V. I, pp. 42-3) and the Petitioner's motion for discovery on

July 21, 1978 (V. I, pp. 55-8). Petitioner's initial discovery response was filed October 2, 1978, and November 9, 1978 (V. I, pp. 204, 226). The prosecution's motion to compel discovery, seeking disclosure of Dr. Bornstein's report (V. I, p. 225) was filed November 9, 1978, the Petitioner filed objections and memoranda opposing the demand of the prosecution (V. I, pp. 233-4, 253, 256-8). The attorney-client aspect was raised by the trial court at hearing (V. I, pp. 279-81). The order requiring disclosure followed thereafter on January 15, 1979. (V. I, pp. 288-90).

II. The Pekin, Illinois, Police Department received a call in the early morning hours of July 9, 1978, from a neighbor of Petitioner's family that he thought he heard gunshots at the residence. A squad car was dispatched, but the police did not enter the residence, and found nothing outside the premises. Then came a second call from a person identifying himself as Jim Childers (the Petitioner). He explained that he was worried about his parents because he had been home and was unable to get in. He asked that the police go out to his parents home. During this second investigation, the officers found petitioner's stepfather and mother shot and stabbed to death, and found Petitioner's younger brother stabbed to death. (V. I, p. 138-9).

The police than called Petitioner at the number which he had left and asked him to come to the police station. He complied. Sgt. William Burress informed him that the people in the house had been murdered. A brief interview, not the subject of any self-incrimination issue, followed, after which Petitioner voluntarily gave fingerprints. A second short interview of Petitioner by police officers ended at 7:29 a.m. After this interview, Petitioner volunteered to the officers that he had forgotten to tell them that he had left some clothing at his house earlier the preceding evening. Shortly after 9:00 a.m., he gave a written consent to search of his car and later, during a third interview, of his person. (V. I, p. 139-47).

Petitioner and Sgt. Burress had a further conversation about 3:00 p.m., then a tape recorded conversation from 3:50 p.m. to 4:42 p.m. during which the Miranda warning was given. — i.e., Petitioner was informed that he had a right to remain silent, that anything he said could be used against him, that he had a right to an attorney, and to have one appointed for him if he could not afford one. He was further informed that he could discontinue

answering questions at any time. He signed a form purporting to waive these rights.

Shortly after this, Petitioner told Officer Charles Bassett that he did not want to talk anymore, and that he wanted an attorney. Bassett observed that that was his right, after which respondent withdrew his request, and said that he would talk, according to Bassett. Petitioner said that, at this point, Bassett mentioned manslaughter as a possibility, instead of murder. Petitioner was then permitted to visit with his fiancé and her mother. Then Sgt. Burress and Officer Bassett obtained from Petitioner the tape recorded statement wherein he admitted killing his family. (V. I, pp. 153-7). A motion to suppress was timely filed in the trial court, and denied.

The statement was completed just before 6:00 p.m. Petitioner had been in custody from 5:30 a.m. that day, although he had not been confined in a cell, but had more or less free run of an area in the City Building where the Police Station is located. He became emotionally upset when the police informed him of the deaths of his family, complained of stomach pains on two occasions, for which he was offered a Tums or Rolaid, and requested permission to leave. The police officers admitted that the first request to leave came at least as early as 10:44 a.m. Their response to that request was, "As soon as we're done here, Jim." (V. I, pp. 157-61). Petitioner had no sleep during the entire 12 hours he was at the station before giving the final, incriminating statement.

Petitioner himself testified that he had asked several times during his confinement at the station when or whether he could leave, and was given answers such as "After a few minutes," "When this is over," etc. While Petitioner had free rein within a part of the Station, an auxiliary policeman was assigned to stay with him. Petitioner further testified that before he gave the last, incriminating statement, Officer Bassett had told him that, if he came out in the open, and told all he knew, the charge would probably be manslaughter, instead of murder. (V. II, pp. 12-20).

Nelda McGuirk testified in support of Petitioner's contentions at the hearing to suppress confession that defendant was emotionally upset and made several requests to leave which were denied, and that he sought medical attention. (V. II, pp. 36-8). Officer Bassett, called in rebuttal on the motion by the State, denied mentioning manslaughter to Petitioner, but admitted tell-

ing him that it would be better to get eveything in the open if there were heat of passion or self-defense.

The statement was admitted into evidence.

The motion to suppress confession was filed on September 5, 1978. (V. I, pp. 111-2). It alleged, in substance, Petitioner's confinement without counsel, the absence of arrest, Petitioner's illness and his several requests to leave, which were denied.

III. Before commencement of the pre-trial hearing on Respondent's Motion to Suppress Confession, two newspaper reporters appeared in court in response to Petitioner's *subpoena duces tecum.* Both reporters stated that they would assert the reporter's in accordance with *Ill. Rev. Stats.*, ch. 51, §111. (V. I, pp. 124-8). Thereafter, an application in accordance with *Ill. Rev. Stats.*, ch. 51, §111-117, the so-called media privilege statute, was filed by defendant, and resisted by the reporter and paper. (V. II, R5). The State's Attorney supported defendant's position seeking disclosure of the sources of the information in the newspaper by arguing that Petitioner's constitutional right to a fair trial was the paramount consideration. (V. II, R44).

During the hearing on the application, defendant's attorney testified to his substantial but unsuccessful efforts to identify the source of information. However, the reporter was not required to disclose the source of his information, (V. II, R47) leaving defendant without potentially helpful witnesses on the motion to suppress. The subject of the newspaper story in question was "sources outside the Childers family" who could testify to 13 hours of interrogation of Petitioner before he confessed.

REASONS FOR GRANTING CERTIORARI

I.a. Requiring Petitioner to disclose the report of a psychiatrist appointed to assist him, and who had examined him and interviewed him concerning the crime, violated Petitioner's constitutional privilege against self-incrimination.

The United States Constitution provides, in relevant part, "No person . . . shall be compelled in any criminal proceeding to be a witness against himself . . ." U.S.C., *Const.*, Amend. V. This protection is binding against the States through the due process clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 at 6, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964).

The Fifth Amendment privilege against self-incrimination in the context of compelled pre-trial disclosure, through discovery proceedings, of witnesses whom a defendant does not intend to call, and of information which a defendant does not intend to use, has never been considered by this Court. The issue has been considered by the highest court of three States. While their decisions appear to be substantially in accord with each other, and support the application of the Fifth Amendment in the instant case, the position of the Illinois Supreme Court at this time is not clear.

People ex rel. Bowman v. Woodward, 63 Ill. 2d 382, 349 NE 2d 57 (1976), was a mandamus proceeding in which the State's Attorney of DuPage County sought an order requiring defendant to:

inform the State whether any scientific tests, experiments or comparisons or any other reports or statements of experts have been conducted or prepared concerning the entitled cause; and if so:

(a) To provide the names and addresses of the individuals conducting, preparing, reporting or interpreting said tests, experiments or comparisons, or giving any other expert report or statement;

(b) To list the article, item or individual examined, tested or compared;

(c) To state whether written or oral reports were prepared showing the findings and results of said scientific tests, experiments or comparisons;

(d) To permit the State to inspect and copy or photocopy any and all of said reports or results or testimony relative thereto.

The trial court, Judge Woodward, entered an order allowing the following:

Defense counsel shall inform the State of, and permit the State to inspect and copy or photograph, any reports or results, or testimony relative thereto, of physical or mental examinations or scientific tests, experiments or comparisons, or any other reports or statements of experts which defense counsel has in his possession or control, only where defense counsel intends to call such expert, at a hearing or trial; and the defendant shall not be compelled to provide the aforesaid discovery to the State where the defendant does not intend to call the expert, or use said reports or material at a hearing or trial.

The mandamus proceeding was filed as an original action in the Illinois Supreme Court. The action was not well-founded, the Illinois Supreme Court held, because 1) the information sought, insofar as it involved witnesses and other information which the defendant did not intend to use at trial, went beyond the scope of pre-trial discovery rules, and relevantly for purposes of the instant Petition, violated the defendant's constitutional protections against self-incrimination. 63 Ill. 2d at 386.

While the Petitioner relied on the *Woodward* opinion in his appeal to the Illinois Appellate Court, Third District, that Court termed the *Woodward* opinion "inopposite" because only one item, the psychiatrists's opinion, was sought in the instant case, as opposed to a generalized fishing expedition. *People v. Childers*, 94 Ill. App. 3d 104 at 109-10, 418 NE 2d 959, 49 Ill. Dec. 939 (1981).

Petitioner argued in his Petition for Leave to Appeal to the Illinois Supreme Court that the distinction was a false one because the issue was not the scope of discovery sought in either case. Instead, the issue was the allowable scope of discovery under the Fifth Amendment, *inter alia*. Since the Illinois Supreme Court denied Petitioner's appeal, both as of right and on Petition for Leave, that Court leaves standing, as the law of Illinois and the most recent word from it on allowable discovery under the Fifth Amendment, an opinion permitting the prosecutor specifically to designate one or more psychiatrists who have interviewed the defendant, and to discover before trial their opinions on issues which might be raised by the defendant at trial, and to discover what disclosures a defendant might have made to them. Apparently, this result would obtain so long as the prosecution were

seeking particular opinions and information, instead of making a generalized discovery demand which would include those particular opinions and information.

Even if the Appellate Opinion in the instant case is thus narrowly construed, the holding is squarely in conflict with decisions of courts in Oregon and New Jersey. *State v. Moore*, 45 Or. App. 837, 609 P. 2d 866 at 868 (1980), though affirming a manslaughter conviction, held that rebuttal testimony of a court appointed psychiatrist who examined the defendant, but was not called as a witness by him, should not have been permitted. In response to the prosecution argument as to waiver, in the context of the attorney-client privilege as to experts employed to assist defense counsel, the Court said that such notions present "such serious implications under the Sixth Amendment . . . and the Fifth Amendment . . . that we are persuaded against fashioning a waiver rule, even in a very limited form."

In *State v. Kociolek*, 23 N.J. 400, 129 A. 2d 417 (1957), the highest Court of New Jersey, considering the Fifth Amendment issue in terms of attorney-client privilege, held that, while that privilege does not, of itself, rise to constitutional stature, it is "essentially interrelated" to not only the right to counsel, but also to the constitutional privilege against self-incrimination, "the oldest of the privileges for confidential communications." 129 A. 2d at 425.

Thus, the Supreme Court of New Jersey and the Appellate Court of Oregon have decided the Fifth Amendment issue in a manner inconsistent with the Appellate Court of Illinois. The opinion of the latter court has been permitted to stand by reason of the Illinois Supreme Court's denial of leave to appeal.

The Fifth Amendment privilege has been held applicable to psychiatrists appointed for indigent defendants in New Jersey. It has been held inapplicable in Illinois. Further, the Appellate Court of Oregon has recognized the applicability of the privilege while the Illinois Supreme Court refused review on a case denying applicability of the privilege. All these cases involved the appointment of psychiatrists for indigent defendants in homicide cases, with the defendants not calling those psychiatrists, but with the prosecution obtaining their testimony over the objection of defendant. The differing conclusions of the Courts of these three States on the applicability of the privilege against

self-incrimination in the context of psychiatrists appointed for indigent defendants requires a definitive conclusion from this Court.

Further, the Illinois Supreme Court in its *Woodward* opinion relied on and quoted extensively from *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P. 2d 919, 22 Cal. Rptr. 879 (1962). *Jones* involved a discovery order almost as extensive as that in *Woodward*. The California Supreme Court ruled that such an order violated defendant's privilege against self-incrimination under the California Constitution and issued a writ of prohibition against its enforcement, except insofar as it related to doctors and other experts whom the defendant intended to call at trial. Although the Illinois Appellate Court would, apparently, distinguish *Jones* in the same manner as *Woodward* — i.e., a "fishing expedition" as opposed to a specific known witness or item — the *Jones* opinion has not been so understood in California. In *McGuire v. Superior Court*, 274 Cal. App. 2d 155, 79 Cal. Rptr. 155 at 159-61 (1969), neither defendant's expert witnesses on a defense of diminished capacity, nor their reports, had to be disclosed if he did not intend to use them.

This Court's decision in *Estelle v. Smith*, U.S. _____, 68 L. Ed. 2d 359, 101 S. Ct. _____ (1981), mandates reversal of the instant case. Although *Smith* came down after the appellate opinion herein, it was called to the attention of the Illinois Supreme Court by a pleading of July 31, 1981, requesting leave to cite additional authority. While there are a number of factual differences between *Smith* and the instant case, including the absence of the insanity defense in *Smith*, the relevant and critical common characteristic of use of conclusions of a psychiatrist who made an examination in a capacity other than as agent of the State obtains. Thus, in *Smith*, a psychiatrist was appointed for the purpose of evaluating defendant's fitness to stand trial. He made a psychiatric examination of defendant and submitted a report finding him fit to stand trial. Smith was charged with capital murder, and found guilty in the first phase of the trial. Pursuant to Texas statute, the same jury then heard the evidence relative to whether capital punishment should be imposed. The State's only witness was the psychiatrist who had been appointed to examine defendant on the issue of fitness to stand trial. He testified, in substance, that defendant was a

sociopath, without remorse for the murder which he had committed, who would more than likely kill again if he had the opportunity.

The psychiatrist's conclusions and testimony were based on an examination of defendant, wherein the defendant discussed the details of the crime wherein he was charged. The defendant was not notified that the psychiatrist would testify against him in the penalty phase of the trial. (This Court's opinion noted that Texas statute prohibited use of defendant's statements on fitness to stand trial examinations from being used on the issue of guilt. Illinois had, at all relevant times, similar statutes, both regarding examinations on fitness and on the issue of insanity, as opposed to commission of the crime. *Ill. Rev. Stats.*, ch. 38, ¶115-6, ¶1005-2-1(h), the latter having been repealed on 12/28/79.) In the instant case, the psychiatrist, Dr. Bornstein, was appointed by the trial court at the Public Defender's request for the purpose of determining whether an insanity defense would be appropriate. It may well be that defendant should have known that Dr. Bornstein could be called to testify in his behalf, since the doctor was there at his counsel's request as an expert for the defense. Whether the defendant would have made full disclosure to Dr. Bornstein, and submitted all the information which he did, if he had known that Dr. Bornstein was, or would become, an agent of the prosecution cannot be known. What is clear is that this Court's opinion in *Estelle v. Smith* requires that a defendant at least have notice that he is dealing with an agent of the State, and that defendant's statements may be used against him, along with other warnings, commonly called the Miranda warnings.

Such warnings were not given in the instant case. That the statements were not used to establish defendant's commission of the murders does not remove them from the prohibitions of *Smith, supra*, since they were used in a manner "plainly adverse" to defendant on the insanity defense, without prior notice that they might be. 68 L. Ed. 2d at 370.

The Appellate Court of Illinois, the Illinois Supreme Court having denied review, has construed the Fifth Amendment protection against self-incrimation in a manner plainly at odds with this Court's construction respecting the admissibility of the results of psychiatric examinations done by psychiatrists other than those hired by the prosecution proceeding explicitly as agents of the prosecution.

I.b. Petitioner's Sixth Amendment right to effective assistance of counsel was violated when a psychiatrist appointed to assist in the defense was called as a witness for the prosecution after court-compelled disclosure of his findings to the prosecution.

Illinois statute provided for the appointment of experts to assist indigent defendants. *Ill. Rev. Stats.*, ch. 38, ¶113-3(d). Other statutes provide for appointment of psychiatrists and other experts to examine defendant in behalf of the prosecution once defendant gives notice of his intent to assert an insanity defense. The Appellate Court of Illinois held in the instant case at 94 Ill. App. 110 that, if an indigent defendant avails himself of his rights under ¶113-3(d), if the expert is one of those enumerated in ¶115-6, and the defendant chooses not to call that expert, then the prosecution can obtain the same information invoking ¶115-6.

This brings the Illinois courts into direct conflict with the Supreme Court of Connecticut, which held that 1) it was a violation of the attorney-client privilege to permit a psychiatrist appointed for an indigent defendant to testify in behalf of the State when the defendant chose not to call him; and 2) as a result, defendant's constitutional right to counsel was violated. *State v. Toste*, 424 A. 2d 293 (1979). Illinois is also in conflict with California, *People v. Lines*, 119 Cal. Rptr. 225, 531 P. 2d 793 (1975); and New Jersey *State v. Kociolek*, 23 N.J. 400, 129 A. 2d 417 (1957). The Appellate Court of Maryland, *State v. Pratt*, 284 My. App. 516, 398 A. 2d 421 (1978), has also decided contrary to Illinois, holding that the attorney-client privilege and the constitutional right to counsel are violated when a psychiatrist appointed for an indigent defendant, who is not called by the defendant, testifies on the issue of sanity for the State over defendant's objection.

The highest court of New York has expressly rejected the attorney-client and constitutional right to counsel reasoning of the *Kociolek* opinion, and held that if a defendant raises the issue of sanity, all experts who have examined or treated the defendant in any capacity may be called on that issue. *People v. Edney*, 39 N.Y. 2d 620, 350 NE 2d 400 at 402-3 (1976). This conflict among the highest courts of four states, not including Illinois in the instant case, should be resolved by this Court.

The *Edney* case entered the Federal courts *sub. nom. United States ex rel. Edney v. Smith*, 425 F. Supp. 1038 (ED, N.Y. 1976),

wherein the Court denied the writ of *habeas corpus*, finding no denial of Fifth or Sixth Amendment rights. Affd. without opinion *sub. nom. Edney v. Smith*, 556 F. 2d 556 (CA 2, 1977). Thus, the Second Circuit is in conflict on this issue with the Third Circuit, *U.S. v. Alvarez*, 519 F. 2d 1036 (CA 3, 1975). In *Alvarez*, a psychiatrist was appointed to examine defendant regarding a possible insanity defense. The psychiatrist's negative findings were disclosed to the prosecutor, and the psychiatrist testified against the insanity theory over the objections of defendant. The Third Circuit held that this procedure violated the attorney-client privilege and the constitutional right to counsel. 519 F. 2d at 1045-7.

These conflicts between the Second and Third Circuits, and between the highest court of New York and the highest court of Connecticut, New Jersey, and California should be resolved by this Court.

I.c. Requiring indigent defendants for whom a psychiatrist is appointed to disclose his conclusions, while not requiring such disclosure of non-indigent defendants, and not requiring such disclosure of any defendant as to other kinds of experts, deprives such a defendant of equal protection of the laws.

The equal protection issue was discussed in oral argument before the Appellate Court of Illinois but not mentioned in the opinion. It was raised in the Petition for Rehearing, pp. 7-8; and in Petitioner's Petition for Leave to Appeal to the Supreme Court of the State of Illinois. The Fourteenth Amendment provides, in relevant part, as follows:

"... nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

The part of the Appellate Court opinion specifically giving rise to the issue appears at 94 Ill. App. 3d 107-8. It was held that if the trial court had denied the State's pre-trial discovery demand for disclosure of the report of the psychiatrist appointed for Petitioner-defendant, but whom petitioner chose not to call, then the State could obtain the information under *Ill. Rev. Stats.*, ch. 38, ¶115-6.

Pursuant to Petitioner's request, the psychiatrist, Dr. Bornstein, had been appointed under *Ill. Rev. Stats.*, ch. 38, ¶113-3(d) to assist Petitioner in preparation of his defense. The latter statute provides for appointment of experts at county expense

when necessary to assist indigent defendants. The former provides for appointment of psychiatric and related experts once a defendant has given notice of intent to raise an insanity defense.

Therefore, under the Appellate Court's construction of the two statutes, the psychiatric reports of psychiatrists appointed for indigent defendants are always discoverable by the State under ¶115-6. Thus, a specific class, indigent defendants who assert an insanity (or intoxicated or drugged condition) defense face pretrial disclosure obligations not faced by indigent defendants who have other kinds of experts — e.g., pathologists, investigators, polygraph examiners, arson experts, ballistics technicians, chemists — appointed to assist in trial preparation or to determine the feasibility of a certain defense. In Illinois, the attorney-client privilege extends to an attorney's agents, Cleary and Graham, *Handbook of Illinois Evidence*, §505.2; *People v. Knippenberg*, 66 Ill. 2d 276, 362 NE 2d 681 (1977); *People v. Ryan*, 30 Ill. 2d 456, 197 NE 2d 15 (1964). No reason appears in this record or in the history of the statutes to explain why indigent defendants raising mental status defenses should be singled out for more onerous pre-trial disclosure obligations than other indigent defendants.

Furthermore, this peculiar discovery requirement applies only to indigents, since those mental status defendants who can hire their own experts would have no reason to inform the State of employment of those experts unless and until the defendant decided to call such expert-psychiatrist or any other kind.

Thus, the Appellate opinion singles out defendants raising mental status defenses, and further singles them out by distinguishing between indigent and non-indigent defendants. Such distinctions have been specifically held unconstitutional in *Estelle v. Williams*, 425 U.S. 501, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976); reh. den. 49 L. Ed. 2d 1194. Though the equal protection issue was not specifically raised, the Connecticut Supreme Court in *State v. Toste*, 178 Conn. 626, 424 A. 2d 293 (1979) held, "The fact that the psychiatric expert was appointed by the court rather than retained by the defense is irrelevant; the law affords no lesser protection for a defendant who is indigent than for one with means to retain his own psychiatrist to prepare a defense." Allowing a psychiatrist appointed by the court to assist the defense, to testify for the State was error.

Illinois has decided the equal protection issue in a manner contrary to this Court's constitutional decision, and contrary to the Supreme Court of Connecticut on the rights of indigent defendants in appointed experts.

II. Petitioner's confession was improperly admitted into evidence over his motion to suppress.

As in *Dunaway v. New York*, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979), the incriminating statement in the instant case came only after Miranda warnings had been given. While Petitioner voluntarily presented himself at the police station upon the request of an officer, and Dunaway was taken to the police station already in custody, that distinction is without a substantial difference in light of Petitioner's several requests to leave during his twelve hours at the station before his confession. Further, Petitioner's request for counsel, though allegedly withdrawn, coupled with the police officer's comments that if there were a possibility of heat of passion or self-defense, these should be brought out in the open, rendered his confession both involuntary and the product of illegal detention. Petitioner's Fifth Amendment privilege, and his Fourth Amendment protection, were denied by the conduct of the police. This Court's decisions in *Dunaway, supra*, and *Brown v. Illinois*, 442 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct., 2254 (1975), require suppression of Petitioner's confession.

III. The trial court denied Petitioner his constitutional right to call witnesses in his own behalf and to confront witnesses against him by upholding a statutory newsgather's privilege and not compelling disclosure of material witnesses.

Defendant's Sixth Amendment right to summon witnesses in his own defense is applicable to the States through the due process clause of the Fourteenth Amendment. "This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 18 L. Ed. 2d 1019 at 1023, 87 S. Ct. 1920 (1967).

Branzberg v. Hayes, 408 U.S. 655, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972), rejected the notion that there is, either at constitutional or common law, a right to refuse to appear and testify when properly summoned to do so in a legal proceeding. The First Amendment freedom of press guarantee does not prohibit every incidental burdening of the press which might result from application of other constitutional requirements and rights. 33 L. Ed. 2d at 640, 642.

A court will be obligated to give deference to a legislative policy recognizing a need for confidentiality of newsmen's sources. However, such a policy cannot operate to defeat constitutional rights to a fair trial and compulsory process. When the person seeking disclosure has a legitimate interest in the concealed information, the protections of a media privilege or shield law must give way. The Sixth Amendment right is such a private and public interest. *Matter of Farber,* 78 N.J. 259, 394 A. 2d 330 at 336 (1978); cert. den. sub. nom. *New York Times v. New Jersey,* 439 U.S. 997, 99 S. Ct. 598, 58 L. Ed. 2d 670 (1978).

The instant decision ignores the policy considerations of *Branzberg v. Hayes, supra,* and is contrary to the similar case of *Matter of Farber,* supra, of the New Jersey Supreme Court.

CONCLUSION

For the foregoing reasons, Petitioner-defendant, James LeRoy Childers, respectfully requests this Court to issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Mr. JUSTICE WEBBER delivered the opinion of the court:

Defendant, a 17-year-old youth at the time of the offense, was found guilty of murder by a jury in the circuit court of Tazewell County in violation of section 9-1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, ¶ 9-1). The victims were his stepfather, his mother, and his younger brother. He was sentenced to three concurrent terms of imprisonment for his natural life.

On appeal defendant raises a number of issues for our consideration. These may be grouped into the following headings: (1) discovery, (2) suppression of confession, (3) trial mechanics, (4) reasonable doubt as to sanity and (5) excessive sentence.

The principal evidence at trial consisted of defendant's confession. This revealed that he arrived home at about 1 a.m. on July 9, 1978, and after a quarrel with his stepfather and his mother he killed them by means of a handgun and a knife. He followed these homicides by killing his younger brother by stabbing him when he was apparently attempting to escape from the house. Defendant then ransacked the house in an attempt to create the appearance of a robbery and multiple homicides. He placed the weapon and knife he had used, money he had taken from the wallets of his parents, and the clothing he was wearing in a paper sack. He cleaned himself up, changed clothing and departed the premises, driving toward Peoria from the home in Pekin. On the way he threw the paper sack into the river from a bridge. Neither the sack nor its contents were ever recovered.

Defendant proceeded to his fiancé's home where he threw his house key to his own home into the yard. It was subsequently recovered. He let himself into his fiancé's home and attempted to sleep but was unable to do so.

Other evidence, *aliunde* the confession, revealed that at about 3 a.m. he called the police station and told the police, after identifying himself, that he had been unable to gain entry into his home at Pekin and asked that someone be sent there to investigate. He left the telephone number at which he could be reached. The police responded and discovered the bodies of the victims shortly afterwards.

The officer in charge of the investigation called the number which defendant had left with the police and asked him to come to the station house. He complied, arriving about 5:30 a.m. with

his fiancé and her mother. He was wearing blue jeans and a red shirt. The officer informed defendant of what had been discovered at his Pekin home, whereupon he became very overcome emotionally. The officer then conducted an interview with the defendant. It was of a very general nature as to the family, who their friends were, what he knew about them and when he had last seen them. Defendant stated that he had remained with his fiancé during the evening hours up to about 1 a.m. at which time he had returned home but was unable to gain entry because he did not have his house key. He asserted that he had given it to his younger brother who had not returned it. He then asked how long he would be required to remain at the station house. The officer testified that he informed defendant that he would not be required to stay but that the police would appreciate his staying in order for them to obtain further information about his family. He further testified that defendant stated that he would stay as long as necessary, and that he would cooperate and help in any way he could.

The officer further testified that after the initial interview defendant's fingerprints and palmprints were taken for comparison purposes. According to the officer, defendant approached him a short time thereafter and stated that he had forgotten to tell the police that he had changed clothing earlier in the evening before going home, and that he had placed this clothing between the front doors of the house. No such clothing was ever found. Shortly after this, defendant consented to a search of his car and of his person (fingernail scrapings and footprints). The consent on the car was obtained about 9 a.m. and consent for the person about 10:45 a.m. The officer testified that these searches were also for comparison purposes.

Meanwhile, the police had interviewed a neighbor to the Pekin home. He stated that he had been awakened at about 1 a.m. by muffled sounds, banging, screams and yelling, coming from the Pekin house. He further told the police that he saw all the lights in the house come on and then go off except for a small hall light, and that he saw a person in red clothing in the back bedroom window. Then, he stated, one of three cars in the driveway left being driven by someone he could not see. The officer in charge of the investigation first had the opportunity to review the neighbor's statement sometime between noon and 1 p.m.

Sometime between 3:30 and 4 p.m. the officer confronted defendant with the neighbor's statement. Defendant became somewhat emotional and stated that he wanted to tell the truth. He was given the *Miranda* warnings and then made a statement to the police which can be summarized as follows: He went to the house and entered using his own key; he found the bodies of his brother, stepfather, and mother; he picked up the gun which he found lying near his brother's body and carried it around the house; during his tour of the house he became covered with blood and changed his clothing; he became frightened and left the house taking the bloody clothing and gun with him; he threw the clothing and gun into the river from the bridge while driving toward Peoria; he denied having anything to do with the killings.

Following this second statement, the officer told defendant that he did not believe him. Defendant then asked to talk to his fiancé and this was permitted. He then made a third, or final statement, commencing at 5:37 p.m. and concluding at 5:58 p.m. The *Miranda* warnings were reiterated, and the third statement was the confession, the substance of which has been set forth above. At the conclusion of the statement defendant was arrested on charges of murder.

Prior to trial defendant filed motions for the appointment of a psychiatrist and for the suppression of his confession. He testified at the suppression hearing that he had been held at the police station for about 12 hours, and had had no sleep the night before. He claimed that he asked to be released about three to five times but received equivocal responses from the officers, *e.g.*, "In a minute," "As soon as this was over," "In a few minutes." He also claimed that he was suffering severe stomach cramps and was given a patent-medicine remedy but no other medical attention; that at first he was permitted to roam at large by himself but soon after the first statement an auxiliary guard followed him everywhere. He further averred that at one point he asked for a lawyer and that he had a discussion with the officer in charge about a possible manslaughter charge. After the manslaughter discussion, he said that he had changed his mind about seeing a lawyer. He was permitted freely to speak with his fiancé at various times during the day.

Other witnesses at the suppression hearing on behalf of the defendant, his financé, the fiancé's mother and defendant's aunt,

all testified along the same lines, *i.e.*, that the defendant appeared pale and ill, that they were told that he might be able to leave "in a few minutes" but that they were free to leave at any time.

The State's witnesses at the suppression hearing, two officers who had been involved in the investigation, testified that defendant had asked for an attorney between the second and third statements and then said that he had changed his mind and did not want one. They denied using the term "manslaughter" but indicated that the words "self-defense" and "heat of passion" were used in the conversation. One officer stated that the defendant asked at the conclusion of the third statement whether he might be charged with manslaughter, but noted that in the third statement defendant had said that no promises had been made to him in return for the statement.

At the conclusion of the hearing the trial court denied the motion to suppress which covered both the second and third statements.

At trial defendant presented an insanity defense and called only two witnesses, both psychiatrists. One stated that defendant suffered from an "acute depressive reaction" and at the time of the offense lacked substantial capacity to appreciate the nature of his conduct and the criminality involved. The second doctor reached similar conclusions and diagnosed defendant as having a psychoneurotic depressive reaction. He stated that even if a policeman had been present at the time, it would have been impossible for defendant to conform his conduct to the requirements of the law.

In rebuttal, the State presented three experts. All of them stated that defendant was capable of conforming his conduct and appreciating the criminality of his actions. One of the State's experts was Dr. Philipp Bornstein, a psychiatrist, who stated that defendant suffered from uni-polar depression, a term which indicated that defendant was depressed at all times. It is over Dr. Bornstein's testimony that much of the controversy in the instant case exists.

Following the jury's verdicts of guilty, the trial court denied defendant's motion for new trial and sentenced him as above described.

The discovery issues arose out of events which occurred short-

ly after arraignment. The public defender was appointed to the defendant and he moved immediately for the authorization of a psychiatrist under section 113-3(d) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1979, ch. 38, ¶113-3(d). The trial court authorized the employment but did not limit the cost to the $250 specified in the statute. Rather, the trial court authorized reasonable fees. The record is obscure as to which of the expert witnesses were paid at county expense, but it is clear that Dr. Bornstein was so paid.

Private counsel entered his appearance later and gave notice of an insanity defense in accordance with Supreme Court Rule 413(d) (Ill. Rev. Stat. 1979, ch. 110A, ¶413(d)). In accordance with the same rule, defendant supplied a list of his witnesses and Dr. Bornstein was not among them. The State moved for disclosure under Supreme Court Rule 413(c) (Ill. Rev. Stat. 1979, ch. 110A, ¶413(c)) of Dr. Bornstein's report of his examination of defendant. Defense counsel vigorously opposed the motion, but it was allowed by the trial court and the State ultimately called Dr. Bornstein as one of its witnesses as above described.

Defendant contends on appeal that the trial court's order directing disclosure of the Bornstein report was beyond the scope of Rule 413(c), that the psychiatrist's conclusion that defendant was not insane within the meaning of the statute, when revealed in this manner, was a violation of his fifth amendment privilege, and that the exposure of the report violated the physician-patient privilege. We disagree.

Defendant relies in large measure on *People ex rel. Bowman v. Woodward* (1976), 63 Ill. 2d 382, 349 N.E. 2d 57. In that case the supreme court agreed with the defendant that the broad discovery sought was a violation of the constitutional assurances against self-incrimination. It is noteworthy that in *Woodward* the State attempted to determine the existence of any tests, experiments or reports, and then to have them produced. No such fishing expedition exists in the instant case. The request to produce was specific, *viz.*, the Bornstein report, which was known by the State to exist since it had been prepared at the expense of the county under section 113-3(d) of the Code. *Woodward* is inapposite.

Furthermore, if the trial court had denied the motion to produce, the State could have obtained the same information by

means of section 115-6 of the Code of Criminal Procedure of 1963 (Il. Rev. Stat. 1979, ch. 38, ¶115-6). That section provides in substance that if notice has been given of an insanity defense, the State may move for an involuntary psychiatric examination by an expert to be named by it. While the trial court's compliance with section 113-3(d) is less than complete, it is apparent that it was proceeding under that section and no other. We can find no basis for making a distinction between treatment of the matter under section 113-3(d) and section 115-6. Defendant has cited no authority which would give him greater protection under the former.

Nor do we find that the report, while adverse to defendant, denied him any privilege against self-incrimination. The sole issue at trial was defendant's sanity. By his confession he had admitted the acts; therefore, the report could bear only on his mental state. In *People v. Williams* (1967), 38 Ill. 2d 115, 230 N.E. 2d 224, there wasn an involuntary examination of the defendant in connection with a competency hearing. The supreme court concluded that since the statements and reports went to the issue of mental condition rather than the truth of the matters which they contained, there was no fifth amendment violation. We find the instant case parallel.

• 1 The trial court's order for disclosure was not in error.

The next general proposition to be discussed is defendant's confession, the third or final statement made to the police, together with the second statement which was contradictory. Defendant argues two principal points: (1) That the totality of the circumstances indicate that the statements were involuntary, and (2) that insufficient time had elapsed from his demand for an attorney to permit a waiver.

The general rule is that the voluntary nature of a confession is to be tested by the totality of the circumstances surrounding its making rather than by any one individual factor. (*In re Lamb* (1975), 61 Ill. 2d 383, 336 N.E. 2d 753.) The sequence of events has been recited above and need not be repeated here. Defendant stresses that he was only 17 years old with no prior involvement with law enforcement authorities; that he was emotionally overcome at the death of his family; that he was ill during at least part of the interrogations; that he had had no sleep since 7 a.m. the morning before; that the officers talked about self-defense

and heat of passion; and that he had been continuously detained since about 5 a.m. in the morning until the third statement at about 5 p.m. in the afternoon.

When viewing the events which occurred at the station house, it must be borne in mind that all of these were initiated by the defendant himself, and deceitfully so. He knew at the time of the initial telephone call exactly what had happened at the Pekin home and from then on until the early afternoon attempted to mislead the police. His efforts at obfuscation, and when these failed, his further efforts to reduce the heinous nature of the offense, fall far short of demonstrating a complete naivete. His emotionalism, which appeared to have an intermittent quality, is suspect. Stomach cramps would seem a normal syndrome under the circumstances.

• 2 The trial court was in a far superior position to judge these matters, and we cannot say that its findings were against the manifest weight of the evidence. *People v. Spataro* (1978), 67 Ill. App. 3d 69, 384 N.E. 2d 553.

As to the question of time lapse affecting the demand for an attorney, the record clearly indicates that it was almost immediately withdrawn. In *People v. Young* (1978), 60 Ill. App. 3d 351, 376 E.E. 2d 739, the defendant first asked for an attorney and then 30 seconds to one minute later elected to speak without further reference to an attorney. The court held that the statement was properly admitted. The supreme court said:

> "An initial request for counsel is not irreversible, absent a showing that the expressed desire to make a statement without the presence of counsel was made under the force of continued impermissible interrogation." *People v. Morgan* (1977), 67 Ill. 2d 1, 5-6, 364 N.E. 2d 56, 58.

• 3 Although defendant argues that the instant case is factually akin to *People v. Savory* (1980), 82 Ill. App. 3d 767, 403 N.E. 2d 118, we do not agree. It is clear that in *Savory* the officers continued their interrogation and convinced the defendant to talk despite his attempted exercise of his *Miranda* rights.

One final comment is in order on the subject of the defendant's confession. The matter is alluded to indirectly in the briefs of the parties, but not emphasized. It is the matter of detention at the station house without probable cause for arrest. In *Dunaway v. New York* (1979), 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248,

the Supreme Court held that detention without probable cause for a long period of time intruded so severely on the fourth amendment rights of the defendant as to trigger the safeguards of illegal arrest. We are aware of the prior decisions in *People v. Dowdell* (1980), 81 Ill. App. 3d 266, 401 N.E. 2d 295, and *People v. McMahon* (1980), 83 Ill. App. 3d 137, 403 N.E. 2d 781, as well as the recent decision in *People v. Townes* (1981), 94 Ill. App. 3d 850, all of which followed *Dunaway* and held statements procured under those circumstances inadmissible.

• 4 The instant case is quite unlike those just referred to. Here the defendant volunteered himself into the station house and deceitfully bent every effort to mislead the police. There is no indication in the record that the police were doing anything other than attempting to protect the defendant until the officer shortly after noontime had the opportunity to review the statement of the neighbor. It was then that defendant's duplicity began to emerge and adequate probable cause to detain him arose. It would create a mockery of constitutional protections to say that a defendant could wilfully and fraudulently engender what superficially appears to be a *Dunaway* situation and then take advantage of it.

No error occurred in the trial court's denial of the motion to suppress.

Defendant next raises two issues regarding the mechanics of trial: (1) The denial by the trial court of his application for the divestiture of a news reporter's privilege, and (2) the denial by the trial court of his motion to excuse a juror.

The first matter arose out of an article appearing in a Peoria newspaper which stated that the defendant had confessed after being interrogated for 14 consecutive hours. Defendant sought disclosure of the reporter's source under section 3 of "An Act concerning disclosure of the sources of information obtained by certain persons in the news media" (Ill. Rev. Stat. 1979, ch. 51, ¶113). After a hearing, the trial court denied the application.

• 5 There appear to be no cases in this State construing the Act, which is admittedly of recent origin. Section 7 of the Act (Ill. Rev. Stat. 1979, ch. 51, ¶117) provides, in part, that the divestiture order shall be granted only if the court finds that all other available sources of information have been exhausted and that the disclosure of the information sought is essential to the pro-

tection of the public interests involved. The record discloses that this test was not met. Defense counsel admitted that he had not inquired of the officers conducting the interrogation how long it had lasted, nor had he inquired of other officers at the station house. Defendant himself never maintained that he had been interrogated, continuously or continually, for 14 hours. Neither did his fiancé, nor the fiancé's mother, both of whom were at the station house all day. Other sources not only were available to defendant, but it is difficult to perceive what public interest might be involved. (Compare *Baker v. F & F Investment* (2d Dist. 1972), 470 F. 2d 778.) No error occurred in the denial of the application.

The incident concerning the juror occurred on the second full day of trial following the impaneling of the jury. One of the jurors communicated to the trial judge that he was an auxiliary policeman with the city of Morton. However, it was not a salaried position and was principaily concerned with crowd control during public events. The juror stated that no questions had been asked of him during *voir dire* as to his possible connection with law enforcement and he did not volunteer such information. Following the receipt of these facts, the trial court promptly informed counsel, and defense counsel moved to dismiss that juror and replace him with an alternate. The motion was denied.

The trial judge made a lengthy statement into the record concerning his conversation with the juror. In it he stated that the juror indicated to him that he could be fair to both sides and that his position as an auxiliary would not affect his judgment. The judge stated that he did not believe that a juror had any affirmative duty to disclose information not asked for on *voir dire* and further that the principal question on trial would be insanity, on which question the judgment of an auxiliary would not be subject to influence any more than anyone else.

• 6 In *People v. Harris* (1979), 74 Ill. 2d 472, 386 N.E. 2d 60, the court was confronted with a situation where a juror had answered falsely on *voir dire*. Even in that situation, the supreme court held that a motion for new trial based on such false answers would not be allowed unless prejudice could be shown and that the matter lies within the sound discretion of the trial court. Defendant here has failed to demonstrate any prejudice, especially since no false answers were involved. The trial court's ruling was correct.

Defendant next contends that the State failed to prove beyond a reasonable doubt that he was sane at the time of the offense. Undoubtedly this is the State's burden. (*People v. Foster* (1979), 76 Ill. 2d 365, 392 N.E. 2d 6.) However, the determination of sanity by the trier of facts will not be disturbed "unless it is so palpably erroneous as to indicate that it was based on prejudice or passion." *People v. Kuhn* (1979), 68 Ill. App. 3d 59, 63-64, 385 N.E. 2d 388.

• 7 In the instant case, the jury heard extensive expert testimony from psychiatrists and psychologists. Without extensive review of the testimony it is clear that the expert witnesses differed greatly in their analysis of the defendant. Two expert witnesses testified that the defendant could not conform his conduct to the requirements of the law at the time of the offense, while three expert witnesses concluded that the defendant could have conformed his conduct to the requirements of the law. Clearly the expert testimony is conflicting, and when such evidence is conflicting it is within the jury's province to believe some experts over others. (*People v. Piche* (1976), 44 Ill. App. 3d 993, 358 N.E. 2d 1260.) It does not appear that the jury's determination can be categorized as so palpably erroneous as to indicate that it was based upon prejudice or passion.

Defendant's final contentions relate to sentencing. He first claims that the statute permitting natural life imprisonment, section 5-8-1(a)(1) of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, ¶1005-8-1(a)(1)), is unconstitutional. This contention is answered in *People v. Nobles* (1980), 83 Ill. App. 3d 711, 404 N.E. 2d 330. The statute is constitutional.

• 8 Defendant next contends that it was error to impose the sentences in his case. We disagree. There was testimony at the sentencing hearing which indicated that the nature of the crime was brutal and that the defendant had experienced prior behavioral problems. The evidence from the pathologist indicating the number of times the victims were stabbed, shot, and mutilated, alone would indicate brutal and heinous behavior. The trial court's judgment in this respect will not be disturbed.

The defendant's conviction and sentence are affirmed.

Affirmed.

MILLS and GREEN, JJ., concur.

APPENDIX B
CONSTITUTIONS AND STATUTES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(U. S. C., Const., Amend. IV)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(U. S. C., Const., Amend. V)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

(U. S. C., Const., Amend VI)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(U. S. C., Const., Amend. XIV, Section 1)

In capital cases, in addition to counsel, if the court determines that the defendant is indigent the court may, upon the filing with the court of a verified statement of services rendered, order the county treasurer of the county of trial to pay necessary expert witnesses for defendant reasonable compensation stated in the order not to exceed $250 for each defendant.

(*Ill. Rev. Stats.*, ch. 38, Section 113-3(d))

If the defendant has given notice that he may rely upon the defense of insanity as defined in Section 6-2 of the Criminal Code of 1961 or the defense of intoxicated or drugged condition as defined in Section 6-3 of the Criminal Code of 1961 or if the facts and circumstances of the case justify a reasonable belief that the aforesaid defenses may be raised, the Court shall, on motion of the State, order the defendant to submit to examination by at least one psychiatrist, to be named by the prosecuting attorney. The Court shall also order the defendant to submit to an examination by one neurologist, one psychologist and one electroencephalographer to be named by the prosecuting attorney if the State asks for one or more of such additional examinations. The Court may order additional examinations if the Court finds that additional examinations by additional experts will be of substantial value in the determination of issues of insanity or drugged conditions. The reports of such experts shall be made available to the defense. Any statements made by defendant to such experts shall not be admissible against the defendant unless he raises the defense of insanity or the defense of drugged condition, in which case they shall be admissible only on the issue of whether he was insane or drugged. The refusal of the defendant to cooperate in such examinations shall not preclude the raising of the aforesaid defenses but shall preclude the defendant from offering expert evidence or testimony tending to support such defenses if the expert evidence or testimony is based upon the expert's examination of the defendant.

(*Ill. Rev. Stats.*, ch. 38, Section 115-6)

Subject to constitutional limitations, the trial court shall, on written motion, require that the State be informed of, and permitted to inspect and copy or photograph, any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other

reports or statements of experts which defense counsel has in his possession or control, except that those portions of reports containing statements made by the defendant may be withheld if defense counsel does not intend to use any of the material contained in the report at a hearing or trial.

(*Ill. Rev. Stats.*, ch. 110A, Section 413(c))

Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:

(i) The names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him; and

(ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial;

(iii) and if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense.

(*Ill. Rev. Stats.*, ch. 110A, Section 413(d))

In civil and criminal cases, in proceedings preliminary thereto, and in legislative and administrative proceedings, a patient or his authorized representative and a psychiatrist or his authorized representative have the privilege to refuse to disclose, and to prevent a witness from disclosing, communications relating to diagnosis or treatment of the patient's mental condition between patient and psychiatrist, or between members of the patient's family and the psychiatrist, or between any of the foregoing and such persons under the supervision of a psychiatrist in the accomplishment of the objectives of diagnosis or treatment.

There is no privilege under this Section for any relevant communications

(a) when a psychiatrist, in the course of diagnosis or treatment of the patient, determines that the patient is in need of hospitalization, provided that such communications shall be admissible

only with respect to issues relating to the need for such hospitalization;

(b) if the judge finds that the patient, after having been informed that the communications would not be privileged, has made communications to a psychiatrist in the course of a psychiatric examination ordered by the court, provided that such communications shall be admissible only with respect to issues involving the patient's mental condition;

(c) in a civil or administrative proceeding in which the patient introduced his mental condition as an element of his claim or defense or, after the patient's death, when his mental condition is introduced by any party claiming or defending through or as a beneficiary of the patient.

As used in this Section, "patient" means a person who for the purpose of securing diagnosis or treatment of his mental condition consults a psychiatrist; "psychiatrist" means a person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry, or a person reasonably believed by the patient to be so qualified; "authorized representative" means a person empowered by the patient or the psychiatrist to assert the privilege and, when given permission by the patient or the psychiatrist, to make disclosure of communications made privileged by this Section. 1872, March 29, Laws 1871-72, p. 405, Section 5.2, added 1963, July 25, Laws 1963, p. 1992, Section 1.

(*Ill Rev. Stats.*, ch. 51, Section 5.2 (repealed January 9, 1979)

Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 81-1206

OCTOBER TERM, 1981

JAMES LEROY CHILDERS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY BRIEF
to
BRIEF IN OPPOSITION TO CERTIORARI

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I
NONE OF THE ISSUES IN THE PETITION FOR WRIT OF CERTIORARI WERE WAIVED.

Respondent contends that Petitioner has failed to raise timely two of the discovery issues in the Petition for Writ of Certiorari. However, the two issues Respondent refers to fairly arose from the decision of the Appellate Court of Illinois, and were therefore raised timely in accordance with Illinois appellate practice.

Petitioner raised the Fifth Amendment discovery issue in the context of the obligation (or lack of obligation) of any criminal defendant to furnish pre-trial the disputed information. It was by reason of the Appellate Court's explicit holding that psychiatrists appointed to assist indigents could be re-appointed to report to the court and prosecution that the right to counsel and equal protection issues arose.

The equal protection and Sixth Amendment right to counsel issues arose by reason of the appellate opinion giving the State the right to have appointed for its and the Court's purposes any psychiatrist previously appointed to assist indigent defendants. Such a statutory construction makes it impossible for a lawyer to have assistance of psychiatric experts in expectation that their views, and the lawyer's course of preparation, will not be known to the State. The equal protection issue also arises from this novel statutory construction because the State's ability to intervene in defense preparation is limited to the classes of 1) indigent defendants 2) who have need of psychiatric experts. There appears no reason to single out these classes, as opposed to all other criminal defendants who may consult with experts before trial and decide not to use some or all the experts.

Illinois appellate procedure has provided for situations wherein constitutional issues arise as a result of appellate action. Thus, Illinois Supreme Court Rule 317 provides, in relevant part, as follows: "Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or the State of Illinois arises for the first time in and as a result of the action of the Appellate Court." *Ill. Rev. Stats.*, ch. 110A, §317.

The case cited by Respondent, *Cardinale v. Louisiana*, 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969) is distinguishable in that, in that case, the issues which this Court were requested to consider had never been raised in the State Courts.

Therefore, it is clear that neither the equal protection issue nor the right to counsel issue was waived. Both were timely raised in accordance with Illinois requirements.

I.a. REQUIRING PETITIONER TO DISCLOSE THE REPORT OF A PSYCHIATRIST APPOINTED TO ASSIST HIM, AND WHO HAD EXAMINED HIM AND INTERVIEWED HIM CONCERNING THE CRIME, VIOLATED PETITIONER'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION, WHEN PETITIONER DID NOT INTEND TO CALL THAT PSYCHIATRIST AT ANY HEARING OR TRIAL.

The psychiatrist and psychologist involved in this case were appointed under *Ill. Rev. Stats.*, ch. 38, §113-3(d), authorizing appointment of experts at county expense for indigent defendants. That this was understood to be a constitutional, as well as statutory, right is established by the trial court's refusal to limit expert expenses to the statutory limits: (The State-Respondent did not object to the trial court's action in this respect.) (R, V.I., p. 33-6, 67-8.) Respondent admits at p. 9 of its Brief that the appointment was at Defendant-Petitioner's request and that the appointed expert was to be the agent of neither the Court nor the State.

But Respondent asserts that, once notice of an insanity defense has been given in accordance with Illinois procedure, the State could learn all it wanted of Petitioner's statements, and of the psychiatric conclusions, by appointing the same psychiatrist under §115-6. (Brief, p.8) This statute authorizes appointment of psychiatrists and other experts to report to the Court and both parties.

Such an argument merely begs the constitutional question involved. If there is not a Fifth (or Sixth) Amendment constitutional right to confidentiality of the psychiatric interview and resultant opinions, then the Court can proceed in that manner. If there is, then it cannot.

Respondent asserts at p. 9 of its Brief that Petitioner has cited no case where the Fifth Amendment has been used to defeat disclosure of a defense psychiatric report of a witness who

will not be called by the defendent. Respondent's statement is inaccurate. In *McGuire v. Superior Court*, 274 Cal. App. 2d 155, 79 Cal. Rptr. 155 (1969), the Court held specifically that pre-trial disclosure of a defense psychiatric report was not required if the defendant did not intend to call that psychiatrist. *McGuire* rested on *Jones v. Superior Court*, 58 Cal. 2d 56, 372 2d 919, 22 Cal. Rptr. 879 (1962), the case relied on by the Illinois Supreme Court in *People ex rel. Bowman v. Woodward*, 63 Ill. 2d 382, 349 NE 2d 57 (1976), for the rule that pre-trial disclosure of expert witnesses and their reports when the defendant did not intend to call such witnesses constituted a violation of the Fifth Amendment. While neither *McGuire* nor *Woodward* involved psychiatrists specifically, surelıy the rubric of expert witness subsumes the category of psychiatrist.

State v. Moor, 45 Or. App. 837, 609 P. 2d 866 (1980); and *State v. Kociolek*, 23 N.J. 400, 129 A. 2d 417 (1957), both apply to the Fifth Amendment in prohibiting the kind of compelled pre-trial disclosure sought here.

From the foregoing discussion, it is clear the conflicts of constitutional law mentioned in the Petition do indeed obtain, and need resolution by this Court.

However, even if the argument of Respondent were all true as propositions of law, and even if a defendant's Fifth Amendment rights can be properly protected by the withholding of Petitioner's statement from any report prepared by the psychiatrist, (p. 8 of its Brief), Petitioner's Fifth Amendment protections were still violated in that the order in the instant case required the psychiatrist to prepare a report, deliver it to both parties and the Court, and, ultimately, to be available to testify.

I.b. PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN A PSYCHIATRIST APPOINTED TO ASSIST IN THE DEFENSE WAS CALLED AS A WITNESS FOR THE PROSECUTION AFTER COURT-COMPELLED DISCLOSURE OF HIS FINDINGS TO THE PROSECUTION, WHEN PETITIONER DID NOT INTEND TO CALL THAT PSYCHIATRIST AS A WITNESS, OR TO USE HIS FINDINGS.

In its Brief in opposition, Respondent admits that Illinois recognizes an attorney-client privilege. Respondent further admits that the several states from which Petitioner has cited cases concerning right to counsel also recognize the privilege. Respondent then asserts that, since the privilege is a common-law or statutorily created rule, the privilege itself is not of constitutional dimension.

Such an argument is flatly contrary to the explicit holdings of the several courts which have considered the privilege in the context of the constitutional right to counsel. Thus, in *State v. Kociolek*, 23 N.J. 400, 129 A. 2d 417 (1957), a psychiatrist was appointed for an indigent defendant at State expense. That psychiatrist was then called by the prosecution over defense objection, and he testified contrary to the defense mental condition theory. The New Jersey Supreme Court reversed the conviction on this issue, explicitly holding the attorney-client privilege to be an integral part of the Sixth Amendment right to counsel:

> The principal is the essence of the ancient common-law attorney-client privilege, in this country and in England and the continental countries deemed a basic civil right, indispensable to the fulfillment of *the constitutional security against self-incrimi-*

> *nation and the right to make defense with the aid of counsel skilled in the law.* [emphasis added] . . . .
>
> The attorney-client privilege is basic to a relation of trust and confidence that, though not given express constitutional security, is yet essentially interrelated with the constitutional guaranties of the individual's right to counsel and immunity from self-incrimination . . . .
>
> The solemn obligation of secrecy is inherent in the essential right to counsel. 129 A. 2d at 424-5.

Kociolek was cited by the Connecticut Supreme Court when it was presented with a case where, as in the instant case, a psychiatrist was appointed at public expense for an indigent defendant to assist the defendant. That psychiatrist testified for the State over defense objection. The attorney-client privilege was presented to the Court in the context of the Sixth Amendment right to counsel, and the Court reversed the murder conviction upon that ground. *State v. Toste,* 178 Conn. 626, 424 A. 2d 293 (1979).

So also *State v. Pratt,* 284 Md. App. 516, 398 A. 2d 421 (1978), wherein the Court held that the attorney-client privilege, possessed of an ancient common-law pedigree and now recognized in Maryland statutes, is "so closely tied to the federal . . . constitutional guaranties of effective assistance of counsel" that, if the privilege were limited "too severely" such constitutional rights would be meaningless.

Respondent also asserts that the federal case of *U.S. v. Alvarez,* 519 F. 2d 1036 (3rd Cir. 1975) was decided solely upon the common-law issue of attorney-client privilege. That assertion is made in the face of the following language from the opinion:

> *The effective assistance of counsel with respect to the preparation of an insanity defense* demands recognition that a defendant be as free to communicate with a

> psychiatric expert as with the attorney he is assisting. [emphasis added.] If the expert is later used as a witness in behalf of the defendant, obviously the cloak of privilege ends. But when, as here, the defendant does not call the expert, the same privilege applies with respect to communications from the defendant as applies to such communications to the attorney himself. 519 F. 2d at 1046.

In the instant case, of course, no such waiver occurred. To the contrary, the defendant did not call the psychiatrist, and objected to his being called by the prosecution.

Respondent has invoked the Fifth Circuit's opinion in *Granviel v. Estelle,* 655 F. 2d 673 (1981), in support of its argument that the attorney-client privilege, and the scope of its application, are matters of state procedure, and not of constitutional right. In that case, defendant was convicted of a murder of a two-year old. The evidence established his commission of seven murders and four rapes. His court-appointed attorneys sought the appointment, prior to trial, of a psychiatrist and psychologist to examine him. That appointment was apparently made under a Texas statute which, in effect, made the psychiatrist available to testify for either side. The Texas statute, as it had been construed, was similar in operation to §115-6, ch. 38 *Ill. Rev. Stats.*, in that the expert would report to the Court, and could be called by either side. Apparently, the appointment was made without reference to any Sixth Amendment, or other constitutional provision, which might have been invoked. If such provisions had been invoked, it is possible that the Court could have found a waiver of the attorney-client privilege (and Sixth Amendment right) by reason of defendant's refusal to talk to other psychiatrists who were appointed. No such refusal occurred in the instant case.

Ill. Rev. Stats., ch. 38, §115-6 provides that, once a defendant has given notice of an insanity defense, he can be examined by court appointed experts, and those experts' reports are available to both parties. In such a context, of course, the constitu-

tional issue could not arise. However, the appointment in the instant case was under neither §115-6 nor any other statute like the Texas one, but instead under §113-3(d), providing for experts to assist the indigent defendant. The issue is not whether experts appointed to assist the court can be called by the prosecution, but whether experts appointed to assist the defense can be called by the prosecution consistently with the Sixth Amendment.

The Fifth Circuit were obligated to decide the former issue, but chose also to speak to the latter. Since their *dicta*, to the effect that the attorney-client privilege does not attach to the constitutional right to counsel, bring it into direct conflict, as they admit, with the Third Circuit in *U.S. v. Alvarez*, 519 F. 2d 1036 (3rd Cir. 1975), this Court is presented an additional basis for the grant of *certiorari* in the instant case. Furthermore, the Fifth Circuit recognize that their opinion conflicts with the high courts of several states and finds support among the State courts only in New York.

II.

Petitioner's discussion in this Reply Brief of the issues under Point I should not be construed as an abandonment by him of the other issues raised in the Petition. Petitioner has attempted to focus on certain matters raised by Respondent which merited additional attention.

CONCLUSION

Petitioner prays that a Writ of Certiorari may issue to the Appellate Court of the State of Illinois.

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